Supreme Court, U.S.
FILED
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No. ____

IN THE SUPREME COURT OF THE UNITED STATES

ROGER LUCAS,

Petitioner,

v.

UNIVERSITY OF COLORADO, HEALTH SCIENCES CENTER, a public entity and educational institution,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Colorado

PETITION FOR A WRIT OF CERTIORARI

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ISSUES PRESENTED

1) Did the Colorado Court of Appeals offend due process when it treated my disparate treatment claim as a discriminatory termination, considering I clearly pled, presented, and argued my claim on a theory of disparate treatment although the University of Colorado argued that it was a discriminatory termination?

2) Did the Colorado Court of Appeals offend due process when it declined to rule on the propriety of an at-will instruction in this discrimination case, considering neither party asserted that the issues were not properly preserved at trial?

3) Do the jury instructions submitted in this case afford a plaintiff the Seventh Amendment right to have a case decided by a fair and impartial jury when the instructions only mention "pretext" as an "excuse" in passing, considering the primary function of the jury in a discrimination case is to determine whether the reasons proffered by an employer to explain their apparent discriminatory conduct were pretextual and based on the facts presented here, the jury wanted to award damages?

4) Is there an impermissible bias in favor of the University of Colorado on the part of the Colorado Court of Appeals given it did not correct clear legal error in this employment

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Jurisdiction, Statutes, and Opinion Below

I, Roger Lucas, petition this Court for a writ of certiorari to the Colorado Court of Appeals opinion on case # 2007CA0166 announced May 15th, 2008 (petition for rehearing denied, July 3rd, 2008). After consideration, the Colorado Supreme Court denied my petition for writ of certiorari on December 22nd, 2008. The original claim presented to the trial court sought to be reviewed arises under 42 U.S.C. §2000 *et seq.* Additionally, this Petition raises issues arising under the Seventh and Fourteenth Amendments to the U.S. Constitution.

Statement of the Case

This case demonstrates the importance of properly applying the *McDonnell Douglas* analytical framework to afford plaintiffs a chance to prevail in employment discrimination cases. Resolving this case will provide guidance to the courts on how to properly instruct the jury on inferring discriminatory intent through pretext.

I had a faculty position with the University of Colorado- Health Sciences Center ("University" or "Defendant") as a professional research assistant between 2000-2003. Dr. Rytis Prekeris was my supervisor in 2002-2003. According to Dr. Prekeris I had solid laboratory skills.[1] At my request, Dr. Prekeris gave me a raise effective July 2003.[2]

On August 26th, 2003, Elizabeth Tarbutton, a co-worker who joined the lab over the summer,

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[1] Prekeris Examination,Record on Appeal("Record"),v.5,p.75,lines:17-20,p.98,lines:10-25

[2] Prekeris Examination,Record,v.5,p.28,lines:2-11

accused me of hitting her.[3] Although I admittedly joked and teased her, Ms. Tarbutton complained to Dr. Prekeris that I was hitting her.[4] Because she was making false complaints, I became upset and yelled at her and ignored her for the next three days.[5] Although both parties disagree as to what happened on August 26-29, testimony at trial from University employees clearly established how the University handled this dispute:

On Friday, August 29th, Ms. Tarbutton asked to transfer out of the lab.[6] The following Monday, September 1st, Dr. Prekeris told me that Ms. Tarbutton wanted to leave the lab because she claimed she felt physically threatened by me and that he was therefore going to fire me.[7] Dr. Prekeris did not discuss the details of Ms. Tarbutton's allegations.[8] Dr. Prekeris stated to me that when a woman complains in the University setting, they have to take the allegations seriously, and essentially do what the woman says otherwise they may get sued.[9] I told Dr. Prekeris I did not know why Ms. Tarbutton would feel physically threatened and

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[3] Tarbutton Examination,Record,v.4,p.4,lines:9-12,p.21,lines:15-17; Whitten Examination,Record,v.6,p.206,lines:5-10, p.222,lines:9-11

[4] Tarbutton Examination,Record,v.4,p.11,lines:4-11; Schonteich Examination,Record,v.7,p.30,lines:1-8

[5] Lucas Examination,Record,v.8,p.177,lines:9-25,p178,lines1-6; Prekeris Examination,Record,v.5,p.67,lines:12-25; Lucas Letter to Britt, Suppl. Rec. 19-20

[6] Britt Examination,Record,v.6,p.163,lines:2-20; Tarbutton Examination,Record,v.4,p.38,lines:7-13; Tarbutton's 8/29 e-mail, Suppl. Rec. 91-92

[7] Prekeris Examination,Record,v.5,p.47,lines:13-15

[8] Prekeris Examination,Record,v.5,p.45,lines:17-25,p.46,lines:1-7,p.47,lines:9-18

[9] Lucas Examination,Record,v.7,p.137,lines:1-6

offered to change my work schedule to help resolve the situation.[10] Dr. Prekeris rejected my proposed resolution.[11] At this meeting, Dr. Prekeris told me not to come to campus for any reason except to speak to Dr. Steve Britt to tell him I would apologize to Ms. Tarbutton.[12]

On September 2nd, I delivered a letter to Dr. Britt.[13] I explained to Dr. Britt that I had a personality conflict with Ms. Tarbutton and voiced my concerns that Ms. Tarbutton was making false allegations against me to have me fired.[14] I requested an investigation to resolve this dispute and named several witnesses who could corroborate my version of events.[15]

Immediately after I delivered my letter, the University scheduled several meetings for Ms. Tarbutton with campus police and human resources

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[10] Prekeris Examination,Record,v.5,p.47,lines:15-18,p.66,lines:15-25,p.67,lines:1-11,p.68,lines:7-19,p.105,lines:19-22

[11] Prekeris Examination,Record,v.5,p.47,lines:19-20,p.76,lines:7-10

[12] Prekeris Examination,Record,v.5,p.43,lines:3-25,p.45,lines:1-6,p.45,lines:10-17,p.48,lines:9-16,p.133,lines:17-20; Britt Examination,Record,v.6p.168,lines:5-9; Notice from Prekeris re: Suspension, Suppl. Rec. 29, 31

[13] Britt Examination, Record,v.6,p.166,lines:21-25,p.167,lines:6-9; Lucas Letter to Britt, Suppl. Rec. 19-20

[14] Britt Examination,Record,v.6,p.168,lines:17-22,p.169,lines:1-12; Prekeris Examination,Record,v.5,p.56,lines:1-3; *see* Tarbutton Examination,Record,v.4,p.38,lines:14-24,p.39,lines:10-25,p.40,lines:1-5,p.74,lines:4-25; Schonteich Examination,Record,v.7,p.49,lines:15-19; John Examination,Record,v.6,p.269,lines:7-9; Lucas Letter to Britt, Suppl. Rec. 19-20).

[15] Lucas Letter to Britt, Suppl. Rec. 19-20

("HR").[16] On September 3rd Ms. Tarbutton made several allegations against me to Officer Whitten.[17] On September 4th Ms. Tarbutton met with Dr. Prekeris, Officer Whitten, and Sam John, an HR employee charged with resolving employee disputes.[18] During these meetings, Ms. Tarbutton made further allegations of sexual harassment and of workplace violence; allegations that were never communicated to me.[19] I was not invited to speak at these meetings nor did anyone seek my version of events.[20]

At this September 4th meeting, the University told Ms. Tarbutton to fill out a work place violence

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[16] Tarbutton Examination,Record,v.4,p.35,lines:11-16,p.40,lines:10-16,p.53,lines:9-14; Prekeris Examination,Record,v.5,41,lines:5-13,p.50,lines:10-21,p.54,lines:2-13; Whitten Examination, Record,v.6,p.203,lines:18-25,p.214,lines:2-7; Britt 9/2 e-mail to Prekeris, Suppl. Rec. 207; Police Report, Suppl. Rec. 45-48

[17] Whitten Examination,Record,v.6,p.200,lines:19-25,p.201,lines:1-4,p.207,lines:17-22; Police Report, Suppl. Rec. 45-48

[18] John Examination,Record,v.6,p.252,lines:2-6,p.252,lines:2-5,p.253,lines:18-23,p.257,lines:5-14,p.258,lines:1-24,p.270,lines:23-25,p.271,line:1; Prekeris Examination,Record,v.5,p.18,lines:18-25,p.19,line:1,p.39,lines:2-8,p.49,lines:5-8,p.64,lines:8-13; Whitten Examination,Record,v.6,p.215,lines:2-11

[19] Prekeris Examination,Record,v.5,p.40,lines:3-25,p.41,lines:1-4,p.54,lines:3-12,p.62,lines:10-13; Tarbutton Examination,Record,v.4,p.54,lines:1-5; Whitten Examination,Record,v.6,p.209,lines:1-25,p.210,lines:1-21; John Examination,Record,v.6,p.255,lines:11-14,p.270,lines:10-20

[20] Prekeris Examination,Record,v.5,p.52,lines:7-11; Whitten Examination,Record,v.6,p.200,lines:12-13; John Examination,Record,v.6,p.251,lines:7-23,p.268,lines:20-25,p.269,lines:1-25

("WPV") form to submit to HR.[21] This form was backdated to September 2nd.[22] Mr. John subsequently delivered this WPV form and my letter to Dr. Britt to Richard Webb, representing my September 2nd letter of apology as a response to Ms. Tarbutton's September 4th allegations.[23] An email from Mr. Webb to Mr. John demonstrates Mr. John's intent at that time to misrepresent my letter as an admission to the allegations contained in the WPV report.[24]

Mr. Webb was the HR employee responsible for conducting sexual harassment investigations.[25] Mr. Webb spoke to Ms. Tarbutton but never contacted me.[26] The University's sexual harassment policy differs from the WPV policy because under a sexual harassment complaint, an employee is entitled to be told of any allegations against them, and is afforded an opportunity to respond, whereas the WPV does not delineate any procedure to follow,

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[21] Tarbutton Examination,Record,v.4,p.76,lines:15-22,p.84,lines:2-9; Whitten Examination, Record,v.6,p.219,lines:17-21,p.232,lines:3-15,p.238,lines:16-25,p.239,lines:1-6; John Examination,Record,v.6,p.255,lines:16-25,p.256,lines:13-15

[22] Whitten Examination,Record,v.6,p.239,lines:7-17; WPV, Suppl. Rec. 51-53

[23] Prekeris Examination, Record,v.5,p.56,lines:9-16,p.57,lines:10-20,p.108,lines:16-22; John Examination,Record,v.6,p.263,lines:5-25,p.264,lines:1-23,p.266,lines:2-25,p.267,lines:1-20,p.291,lines:18-25,p.292,lines:1-25

[24] Webb e-mail to John, Suppl. Rec. 80

[25] John Examination,Record,v.6,p.260,lines:5-7,p.262,lines:10-24,p.275,lines:17-23

[26] Tarbutton Examination,Record,v.4,p.54,lines:17-22; Webb notes, Suppl. Rec. 65

a difference that Mr. John was aware of.[27] The Sexual harassment policy also clearly states that it is a violation of University policy to make false reports.[28]

On September 7th, Dr. Prekeris told my co-worker, Eric Schonteich, that he already made the decision to terminate me on September 1st, even before the investigation was concluded.[29] According to Mr. Schonteich, Dr. Prekeris told him to provide documentation to Mr. John to help justify my pending termination.[30] I was never informed of Mr. Schonteich's allegations.[31] Notably, Mr. Schonteich testified that he spoke to Dr. Prekeris for the first time about this dispute on August 29th, but testified at trial that after this conversation the situation in the lab "got worse", which is clearly illogical given that I was not on campus after September 1st.[32]

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[27] John Examination,Record,v.6,p.276-79,p.288,lines:18-25,p.289,lines:1-11, p.290,lines:4-25,p.316,lines:1-22; Sexual Harassment Policy, Suppl. Rec. 32-36; Anti-violence Policy, Suppl. Rec. 37-40; Tarbutton's 9/10 email to John, Suppl. Rec. 79

[28] Policy Re: False Reporting, Suppl. Rec. 267-271

[29] Schonteich Examination,Record,v.7,p.32,lines:24-25,p.33,lines:1-11,p.76,lines:23-25,p.77,lines:1-4, John Examination,Record,v.6,p.321,lines:5-8

[30] Prekeris Examination,Record,v.5,p.64,lines:10-24,p.108,lines:3-11,p.110,lines:24-25,p.111,lines:1-3; Schonteich Examination,Record,v.7,p.24,lines:5-13,p.33,lines:12-25,p.34,lines:1-8,p.40,lines:4-7,p.43,lines:12-25,p.44,lines:1-6,p.45,lines:9-20; John Examination,Record,v.6,p.283,p.294,lines:8-21,p.295,lines:11-21,p.296,lines:14-24,p.317,lines:1-14; Schonteich Complaint, Suppl. Rec. 75-76

[31] Prekeris Examination,Record,v.5,p.15-23,p.63,lines:20-25

[32] Schonteich Examination,Record,v.7,p.75,lines:5-13,p.72,lines:1-10

On September 8th, Dr. Prekeris emailed Mr. John the results of his "personal investigation" where he states to Mr. John that he had already decided to terminate me.[33] Dr. Prekeris testified that he would feel better about firing me if HR told him I was in violation of University policy.[34]

On September 10th, I contacted Dr. Prekeris via email and inquired about the investigation.[35] Dr. Prekeris told me that the investigation was pending but he would have an answer by the end of the week.[36] On September 12th, Dr. Prekeris terminated my employment without telling me I was in violation of any University policies; he merely handed me a letter stating that he was exercising his at-will option.[37]

Not only did the University exclude me from the investigatory proceedings, none of the witnesses I listed in my September 2nd letter were contacted for input.[38] Mr. John testified that the reason he did not contact me was because as soon as he heard the complaint from Ms. Tarbutton he knew there was a

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[33] Prekeris Examination,Record,v.5,p.109,lines:9-23; John Examination,Record,v.6,p.318,lines:1-20; Prekeris Investigation Report, Suppl. Rec. 77-78

[34] Prekeris Examination,Record,v.5,p.110,lines:20-25,p.111,lines1-5

[35] Prekeris Examination,Record,v.5,p.69,lines:17-23,p.70,lines:3-5; Lucas 9/10 e-mail to Prekeris, Suppl. Rec. 264

[36] Prekeris 9/10 e-mail to Lucas, Suppl. Rec. 264

[37] Prekeris Examination,Record,v.5,p.81,lines:2-11; Termination Letter, Suppl. Rec. 23

[38] Prekeris Examination,Record,v.5,p.62,lines:18-25,p.63,lines:1-4,p.74,lines:3-9; John Examination,Record,v.6,p.259,lines:18-21,p.260,lines:13-17,p.262,lines:1-11

violation of the WPV policy.[39] I did not find out about the alleged WPV violations until I received a copy of the police report in November 2003.[40] After finding out that the University was claiming I had violated University policy, I initiated suit against the University and Ms. Tarbutton for unlawful employment discrimination, breach of contract, and several tort claims.

After a four day trial in August 2006, a jury was asked to resolve the issue of unlawful employment discrimination. The jury returned a verdict in favor of Defendant. Prior to concluding their one hour deliberations, the jury submitted one question to the court: "If all jurors agree on verdict A, then if on the line, can we add something at the bottom to say we want him to receive some monetary damages?" (Record, v.9,p.100-101).

Pursuant to Colorado Rule of Civil Procedure 59, I filed a motion for Post-Trial Relief, asserting that because Defendant did not proffer a legitimate, non-discriminatory reason to explain the discriminatory investigation and treatment of me as compared to Ms. Tarbutton, I was entitled to a judgment as a matter of law under *McDonnell Douglas*. (Plaintiff's Motion for Post-Trial Relief ("JNOV"),Record,v.3,pp.756-766). The trial court denied my motion stating it found sufficient evidence on record whereby a jury could find that my termination was not motivated by unlawful gender discrimination and that the investigation was not pretextual. (Record,v.3,p.788). I timely filed an appeal, asserting the trial court erred in denying my

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[39] John Examination,Record,v.6,p.265,lines:5-14,p.291,lines:5-17,p.327,lines:1-21

[40] Police Report Suppl, Suppl. Rec. 48

motion for JNOV, as well as asserting erroneous jury instructions, specifically, a contested at-will instruction, and a failure to adequately explain the concept of pretext to the jury, arguing plain error. (Plaintiff's Opening Brief on Appeal). The Colorado Court of Appeals ("Court of Appeals") rejected my arguments and affirmed the trial courts ruling and the jury's verdict, issuing a very brief and cursory unpublished opinion. ("Opinion"). I subsequently petitioned the Colorado Supreme Court for a writ of Certiorari which was denied. This Petition follows.

LEGAL ARGUMENT

I. The Colorado Court of Appeals offended due process when it treated my disparate treatment claim as a discriminatory termination because I clearly pled, presented, and argued my case on a theory of disparate treatment although the University of Colorado argued that the claim was a discriminatory termination.

I clearly pled my claim under 42 U.S.C. §2000 *et seq.* as a disparate treatment claim. My complaint reads: "Defendant UCHSC intentionally discriminated against Plaintiff on the basis of his gender, and treated other female employees more favorably than Plaintiff with respect to the terms and conditions of his employment, in violation of Title VII." (Plaintiff's Verified Complaint,¶51, Record,v.1,p.7). My third claim for relief (C.R.S. §24-34-402: Colorado's Anti-Discrimination Law) reads: "Plaintiff was treated differently and less favorably than similarly situated female employees with respect to terms and conditions of his employment." (Plaintiff's Verified Complaint,¶60,Record,v.1,p.9).

During the hearing on Defendant's motion for directed verdict, Defendant acknowledged that I was proceeding under a theory of disparate treatment, although Defense counsel argued that the claim was a termination claim. (Record,v.9,pp.5,8). In response, I argued that this was a "terms and conditions" claim asserting that the issue here was the manner in which the University was discriminatorily applying University policies, as evidenced by the way they conducted the investigation prior to my termination. (Record,v.9,pp.14-21). In denying Defendant's motion, the court found an inference of discrimination arising from the manner in which the investigation was conducted. (Record,v.9,p.27,lines12-20). The court held that a "basis for the claim of gender discrimination is...the way that the investigation was conducted...did not give Plaintiff adequate or reasonable notice of the specific later claims and an opportunity to be heard on those issues." (Record,v.9,p.34,lines1-13). On appeal, Defendant admits: "Because Mr. Lucas argued that the University acted contrary to its practices and would have afforded a similarly-situated female employee greater opportunities to explain their conduct, Instruction 7 informed the jury 'You may, however, consider an employer's failure to provide such opportunities or follow its procedures as evidence of gender discrimination'" (Defendant's Answer Brief on Appeal,p.28).

The court made no ruling that my claim was not a disparate treatment claim, nor did the court make it clear at trial that it was converting my cause of action from a disparate treatment claim to a discriminatory termination. (Record,v.9,pp.25-29). The jury verdict forms explicitly asked the jury to determine whether the "actions in" terminating me

were discriminatory, consistent with my pleadings and theory of the case. (Record,v.3,pp.663-666;v.9,p.28,lines11-17). If the issue did not center around the discriminatory investigation, there would have been no need to provide Verdict form C. (Record,v.3,p.666). Although the court did state that it was rejecting any claims asserted under a due process or breach of contract theory stating that my cause of action does not stem from any legal entitlement to the procedural protections under University policies, the court explicitly found that the manner in which the investigation was conducted gave rise to an inference of discriminatory intent; i.e. this is a discrimination case, not a wrongful termination. (Record,v.9,pp.25-27). The undisputed evidence of the investigation presents a clear disparity in treatment between me and Ms. Tarbutton, to which the University never proffered a legitimate non-discriminatory explanation. Surely no court could accept Defendant's statement that "There has been evidence in this case that people have not followed policies and procedures but the jury has to be instructed that it's not discrimination unless those decisions were purposeful rather than sloppy, negligent, or not well-intentioned" as carrying their burden. (Record,v.9,p.45,lines:14-18).

Colorado Rule of Civil Procedure 59 allows a litigant to move for judgment notwithstanding the verdict without requiring a motion for directed verdict at the close of evidence, in contrast to its federal counterpart. (*compare* Colo.R.Civ.Proc. 59 to Fed.R.Civ.Proc. 50). Because of this difference, this case presents a unique situation where a plaintiff moved for a judgment as a matter of law against the employer after the cause was submitted to the jury, a situation that could never arise in federal court.

Following trial, I properly moved for judgment notwithstanding the verdict, asserting legal error because based on the evidence presented, it is clear that the University did not carry their burden of rebutting the inference of unlawful discrimination. (JNOV,Record,p.756-766). The fact that I, the plaintiff, moved for judgment as a matter of law against the Defendant is rare in and of itself. *(see, e.g. Wilkerson v. Schirmer Engineering Corp.* 2006 WL 228818, p. 7 (D. Colo. Jan. 30, 2006)(noting that it is rare for a Defendant to not meet their burden under step two)). In response, Defendant asserted that this was a termination case in direct opposition to my position. (University's Response to Plaintiff's Motion for Post-Trial Relief,Record,pp.769-774). In denying my motion for JNOV, the court merely stated there was sufficient evidence whereby a jury could find that my termination was not based on unlawful discrimination, without citing to any authority that allowed the court to ignore the cause of action that I brought and to adopt the cause of action argued by Defendant. (Order Re: Plaintiff's Motion for Post-Trial Relief-Dated January 5, 2007,Record,p.788).

This inexplicable change prejudiced my due process rights by depriving me of a fair trial because the court effectively changed the elements that I needed to prove in order to prevail *after* all of the evidence had already been presented, contrary to fundamental principles of trial procedure. (*see, e.g. Midland Valley R. Co. v. Ennis,* 159 S.W. 214, 217 (Ark. 1913)(holding that after proof is introduced, the pleadings cannot be amended so as to substantially change the cause of action)). Changing a cause of action is clearly impermissible after the evidence is presented because a trial's entire preparation,

planning, presentation, and strategy hinges upon which elements a litigant needs to prove or defend at trial.

Here, because there is no defense to a disparate treatment claim, Defendant argued this claim to be a discriminatory termination. This change in treatment of this case is likely to have resulted from the state court's inexperience with handling employment discrimination claims, as most discrimination claims are handled by federal courts; hence the state courts seeking guidance from federal circuits. *see Colo. Civil Rights Comm'n v. Big O' Tires, Inc.,* 940 P.2d 397, 399 (Colo. 1997). After all the evidence was presented, the judge stated: "I will start off with a few comments on the law...I admit I haven't read a great deal on this subject other than what's been presented and -- and what I could find in the last few days..." (Record,v.9,p.25,lines:9-14).

This action not only deprived me of my right to a fair trial, but I was deprived of a legitimate property interest evidenced by the jury's willingness to award me monetary damages as redress, and of a legitimate liberty interest in defending against the stigmatizing effects to my reputation caused by the unfounded allegations levied against me. (*see Board of Regents v. Roth*, 408 U.S. 564 (1972)(finding a liberty interest when a stigma is imposed foreclosing an individual from his freedom to take advantage of other employment opportunities)).

This Court in *Neder v. United States* held that "Constitutional errors affecting the framework within which a trial proceeds, rather than simply an error in trial process itself, infect the entire trial process and necessarily renders the trial fundamentally unfair, so as to preclude harmless error review." 527 U.S. 1 (1999). Here, both the state

trial and appellate courts clearly departed from the analytical framework established under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

A. A disparate treatment claim is a separate claim from a discriminatory termination, although a termination can be resulting damages from the unlawful disparate treatment.

This Court in *Meritor Savings Bank, FSB v. Vinson* noted that the phrase "terms and conditions or privileges of employment" evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment. 477 U.S. 57 (1986). In most disparate treatment cases, much if not all of the evidence of intent is circumstantial. *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162, 2171 (2007)*(citing Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 1004 (1998)(noting that in a disparate treatment claim, the *McDonnell Douglas* factors establish discrimination by inference)).

McDonnell Douglas established the analytical framework for the burdens of production and the order for the presentation of proof in Title VII discriminatory treatment cases. *St. Mary's Honor Ctr. v. Hicks*, 113 S.Ct. 2742, 2746 (1993). Under this framework, a plaintiff must first establish a prima facie case of discrimination by showing that: 1) he belongs to a protected class, 2) he was qualified for the position, 3) he suffered an adverse employment action despite his qualifications, and 4) the circumstances give rise to an inference of unlawful employment discrimination. *(see Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981) *citing McDonnell Douglas*, 411 U.S. at 802. (The

exact language under *McDonnell Douglas* has been modified to encompass other forms of discrimination-*citations omitted*)). After a plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate a legitimate non-discriminatory reason to rebut the inference of unlawful discrimination raised. *Burdine,* 450 U.S. at 253. If no reason is proffered, the factfinder is required to rule in favor of the plaintiff because no issue of fact remains. *id.* at 254. However, if a reason is proffered, the issue must be submitted to the factfinder to determine whether the stated reason is in fact legitimate, or merely pretext. *id.* at 253

Clearly, the prima facie burden is de minimus. *see Plotke v. White,* 405 F.3d 1092, 1101 (10th Cir. 2005). The *Plotke* court noted that a variety of circumstances can give rise to the critical inference of unlawful employment discrimination, including "preferential treatment given to employees outside the protected class." *id.* Disparate treatment cases are clearly not limited to situations where an employer treats an employee more harshly than a similarly situated employee who engaged in misconduct of comparable seriousness, as Defendant suggested to the court (Record,v.9,p.5), as federal courts liberally define "adverse employment actions". *Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1264 (10th Cir. 1998). Such actions are not limited to monetary losses in the form of wages or benefits. *Jeffries v. Kansas*, 147 F.3d 1220, 1232 (10th Cir. 1998). Instead, federal courts take a case by case approach examining the unique factors relevant to each situation. *id.*

To be an adverse action the employer's conduct must be materially adverse to the employee's job

status. *Wells v. Colorado Dept. of Transp.*, 325 F.3d 1205, 1213 (10th Cir. 2003). An adverse action may be conduct that may cause public humiliation or harm to future employment prospects. *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986-87 (10th Cir. 1996). The *Berry* court found that a malicious prosecution initiated against the plaintiff may constitute an "adverse employment action." *id.* Adverse employment actions can also be disciplinary proceedings such as warning letters and reprimands (*see Medina v. Income Support Div., New Mexico*, 413 F.3d 1131, 1137 (10th Cir. 2005)), or simply making an employee go through several hoops in order to obtain severance benefits (*see Corneveaux v. Cuna Mutual Insurance Group,* 76 F.3d 1498, 1502 (10th Cir. 1996)).

Federal courts have dealt with cases involving multiple claims of discrimination stemming from different conduct on the part of the employer that adversely affect the employee. *see, e.g. Wells v. Dynamic Restaurants LLC.* 2006 WL 118397 (D. Colo. Jan.13, 2006)(distinguishing wrongful termination, promotion practices, hostile work environment, and discrimination with respect to "terms and conditions"); *Wilkerson v. Schirmer Engineering Corp.* 2006 WL 228818 (D. Colo. Jan. 30, 2006)(distinguishing sexual harassment, retaliation, and discrimination in "terms and conditions"); *Henderson v. United Parcel Service.* 2006 WL 1658690 (D. Colo. June 7, 2006)(distinguishing hostile work environment, retaliation, and discrimination with respect to "terms and conditions"); *White v. Home Depot U.S.A., Inc.* 2006 WL22261198 (D. Colo. Aug. 3, 2006)(distinguishing discrimination in pay, promotion, and hostile work environment); *Piercy v.*

Maketa. 2008 WL 2667266 (D. Colo. June 30, 2008)(distinguishing retaliation and discrimination in "terms and conditions"). These courts all recognized discrimination with respect to "terms and conditions" of employment as a separate claim.

In my case the "terms and conditions" form of discrimination must be analyzed separate from a discriminatory termination and this analysis must be performed first. This logically follows because the reasons used to justify my termination are the products of the very investigation that I challenged as discriminatory, and are therefore highly suspect and cannot be construed as a legitimate reason. In our jurisprudence, there are numerous instances where evidence cannot be used to advance a cause because the manner in which the evidence is obtained raises serious questions as to its reliability. To analyze this case as a termination case would be akin to accepting evidence of an accused criminal defendant obtained as a result of challenged police misconduct without first ruling on a legitimate motion to suppress.

This reasoning is consistent with this Court's analysis in *Ledbetter, supra.* 127 S.Ct. 2162 (2007). Although *Ledbetter* primarily dealt with statute of limitations issues, the reasoning used by this Court to reach its conclusion should control here. In *Ledbetter* this Court stated that within the context of whether an EEOC charge was filed on time, this Court has stressed the need to identify with care the specific employment practice that is at issue. *id.* at 2167 *citing National Railroad Passenger Corporation v. Morgan,* 536 U.S. 101, 114 (2002). This Court rejected Ledbetter's arguments because "they would require us in effect to jettison the defining element of the legal claim on which her Title VII recovery was

based." *id.* This Court held that Ledbetter's claim was a disparate treatment claim, the central element of which is discriminatory intent. *id. citing Chardon v. Fernandez*, 454 U.S. 6, 8 (1981).

In resolving *Ledbetter* this Court explained: "In *Morgan*, we explained that the statutory term 'employment practice' generally refers to 'a discrete act or single occurrence that takes place at a particular point in time. 536 U.S. at 110-111.'" *Ledbetter, 127 S.Ct.* at 2169. This Court cited to *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 907 908 (1989), where the Court held that the EEOC charging period ran from the time when the discrete act of alleged intentional discrimination occurred, not from the date when the effects of this practice were felt. *Ledbetter, 127 S.Ct.* at 2168. This Court also referred to *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980), where the Court rejected plaintiff's argument, recognizing that "one of the effects of the denial of tenure," namely, his ultimate termination, "did not occur until a later date." *Ledbetter, 127 S.Ct.* at 2168.

Although my case could have been pled as a discriminatory termination, I clearly pled it with the discriminatory investigation as the "discrete act", with my ultimate termination stemming from this disparate treatment. Under my first claim for relief it reads: "As a result of this discrimination Plaintiff was ultimately terminated" referencing the discriminatory act of disparate treatment in the preceding paragraph. (Plaintiff's Verified Complaint,¶¶51-52,Record,v.1,p.7). My third claim for relief is consistent with this theory stating the termination and resulting damages stemmed from the disparate treatment. (Plaintiff's Verified Complaint,¶¶60-62,Record,v.1,p.9). When Defendant

argued at directed verdict that this was a termination claim, my trial counsel responded by asserting it was a "terms and conditions" claim. (Record,v.1,pp.14-15). My motion for JNOV and appeal both focused on the discriminatory investigation as the discrete act of discrimination. (JNOV,Record,v.3,pp.756-766; Opening Brief on Appeal,p.13-19). Nowhere on record does either the trial court or Court of Appeals cite to any authority that allows the Defendant to choose the cause of action, nor is there any ruling by either of these courts changing the cause of action, other than an inexplicable shift by these courts in the analysis of this case.

In *Ledbetter* this Court explained "that Ledbetter's attempt to take the intent associated with the prior pay decisions and shift it to the 1998 pay decision is unsound. It would shift intent from one act (the act that consummates the discriminatory employment practice) to a later act that was not performed with bias or discriminatory motive. The effect of this shift would be to impose liability in the absence of requisite intent." *Ledbetter,* 127 S.Ct. at 2170.

Equally unsound is Defendant's attempt to shift the focus of the inquiry here from a disparate treatment claim to a discriminatory termination, and the Court of Appeals inexplicable adoption of Defendant's position. (Opinion,pp.1-4). Under a disparate treatment theory, the requisite intent I need to prove is established as a matter of law because stating that the failure to follow proper procedures may have resulted from sloppiness or negligence surely does not serve to carry the burden of proffering a "legitimate non-discriminatory reason". And because the "legitimate non-

discriminatory reason" proffered to explain the discriminatory termination stems from the discriminatory investigation, that proffered reason cannot be legitimate; therefore I would likewise be entitled to a judgment as a matter of law on a termination claim. The effect of this shift, coupled with the erroneous jury instructions allowed the Defendant to escape liability by confusing the analysis when there is the requisite intent, although the jury did not have the legal guidance under *McDonnell Douglas* to see it. This analysis is consistent with the jury question submitted in this case asking the court if they could award damages. Clearly, the facts presented to them made them think that the situation was not right, but the instructions they were given distorted the governing law and analysis resulting in an unjust, erroneous verdict.

B. The Court of Appeals stated the wrong standard of review with respect to my disparate treatment claim and my motion for judgment as a matter of law.

This case presents a rare situation where a plaintiff moved for judgment as a matter of law attacking the second step of the *McDonnell Douglas* analysis *after* the cause was submitted to the jury. This case also presents a situation where the court submitted the cause to the jury *without* making a determination of what the proffered legitimate reason was to rebut the prima facie case. (Jury Instructions,Record,v.3,pp.640-662). The *jury* was charged with making the determination of whether the defendant stated a legitimate nondiscriminatory reason to explain its actions. (Jury Instruction

10,Record,v.1,p.651). This instruction is error on the part of the trial court because it asked the jury to make a determination that is properly a matter of law. Within the context of a Batson challenge which parallels the *McDonnell Douglas* framework, this Court held that the issue in the second step of the inquiry is the facial validity of the reason articulated by the [defendant], which is a question of law warranting *de novo* review. *Purkett v. Elem,* 514 U.S. 765, 768 (1995). Because the court charged the jury with making this determination, my motion for JNOV on the grounds of sufficiency of the evidence is a motion that works under these circumstances to properly preserve the issue.

The Court of Appeals mistakenly concludes that there was sufficient evidence to support the verdict. Notably absent from their cursory analysis is the application of the burden shifting framework to the discriminatory investigation. While true that on a motion for judgment notwithstanding the verdict, the reviewing court must view the evidence in the light most favorable to the verdict, the evidence must still be viewed within the context of the *McDonnell Douglas* framework. Here, because the trial court submitted the cause to the jury after finding a prima facie case, the next issue that must be analyzed is whether there was evidence produced that rebutted the inference of discrimination. A *de novo* examination of the record shows that there was no evidence offered to explain the disparity in treatment. Therefore, my motion for JNOV based on insufficiency of the evidence has merit.

The Court of Appeals disregards the trial court's finding of a discriminatory investigation without explaining what error exists in the trial court's conclusion. Instead of according deference to

the prima facie case and examining the record *de novo* to see whether the Defendant carried their burden, the Court of Appeals selected facts from the record to support a finding that the investigation was not discriminatory, ignoring all the undisputed facts contrary to Defendant's position. The Court of Appeals analysis is clearly flawed and contrary to well established precedent under *McDonnell Douglas.*

The purpose for the three-step framework is to provide a basic "order of presentation of proof" so the controversy can be brought into focus. *Carey v. United States Postal Service,* 812 F.2d 621, 623 (10th Cir. 1987). The specific elements which must be proven depend upon the nature of the challenged employment decision. *Brown v. Parker-Hannifin Corp.,* 746 F.2d 1407, 1409 (10th Cir. 1984). "If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case." *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 254 (1981). Establishing discrimination as a matter of law, the trial court should not have charged the jury with determining whether they found unlawful discrimination, but only charged them with determining what the damages should be in this case, which is precisely what they wanted to do.

II. **The Colorado Court of Appeals violated my right to due process when it declined to rule on my assertions that the tendered at-will instruction in this employment discrimination case was improper in the absence of any breach of contract or wrongful termination claims, given its potential to mislead and confuse the jury.**

Notwithstanding the fact that this claim is properly a disparate treatment claim, the following issue is relevant to demonstrate how the Court of Appeals exercised its appellate review of this case. During the hearing on jury instructions, my trial counsel objected to Jury Instruction 7 asserting that it was irrelevant and overemphasized the at-will language. (Record,v.9,p.40,lines:13-25,p.41,lines:1-5). Instruction 7 reads:

> The Court instructs you that Plaintiff was an employee at-will. The law permits an employer to discharge an at-will employee at any time for any non-discriminatory reason. The law does not require an employer to afford an employee any particular due process, such as reasonable notice of the allegations against an employee or a reasonable opportunity to be heard, before discharging an employee. You may, however, consider an employer's failure to provide such opportunities or follow its procedures as evidence of gender discrimination.

(Jury Instruction 7,Record,v.3,p.648)

In response to Defendant's argument in favor of the instruction, my trial counsel reiterated his position that "the original form of jury instruction number 7 overemphasizes and is (inaudible) in light of what's left." (Record,v.9,p.44,lines2-12). Clearly, the inaudible word used was "irrelevant" when examining the entirety of the argument made. On appeal, I argued that the at-will instruction was erroneous because it was irrelevant and had a tendency to confuse the jury as there were no issues

present requiring it. (Opening Brief on Appeal, pp.13,20-23) .

Notably, Defendant does not claim that the issue was not preserved. (University's Answer Brief on Appeal,p.26-30). In litigating this issue, Defendant acknowledges that the Seventh Circuit found that "we doubt that [the at-will instructions] should have been given" *id.* at 29 (citing to *Achor v. Riverside Golf Club*, 117 F.3d 339, 341 (7th Cir. 1997)) supporting my position of instructional error.

The Court of Appeals *sua sponte* found that the issue was not properly preserved and declined to rule on it. (Opinion,pp.6-8). This decision is curiously opposite the holding in *Anderson v. United States*, 417 U.S. 211 (1974). In *Anderson* this Court held that "Where admissibility of certain testimony was challenged at trial, it was proper for the Court of Appeals to consider grounds related to such underlying objection, including grounds of objection not presented to the trial court." Id. at 218. This Court noted "that although there is a rule stating that the Court of Appeals need not ordinarily consider grounds of objection not presented to the trial court, *Hormel v. Helvering*, 312 U.S. 552, 556 (1941), this rule is not without exceptions, particularly in criminal cases where appellate courts can notice errors seriously affecting the fairness or integrity of judicial proceedings. *United States v. Atkinson*, 297 U.S. 157, 160 (1936)." *Anderson*, 417 U.S. at 218.

Here, the Court of Appeals *sua sponte* held that the issues argued on appeal were not the same issues raised at the trial level. (Opinion,pp.6-8). Clearly, arguing that the at-will instruction is irrelevant and capable of confusing the jury presents the same issues as objecting stating "the issues for

which the at-will instruction may be a central part of the case...the court has ruled on", "not as accurate a statement of the law", "overemphasizes", "and is (inaudible) in light of what's left", or at the least presents related issues.

In *Smith v. Texas* this Court held that "On a claim of erroneous jury instruction that was preserved by proper objection, relief should be granted so long as the error was not harmless." 550 U.S. 297 (2007). When an employment discrimination case is properly submitted to the jury under the *McDonnell Douglas* framework, the primary function of the jury is to question the stated reason for discharge. *Burdine,* 450 U.S. at 253. The at-will instruction submitted here could have easily confused a proper analysis because by stating that "the law permits an employer to discharge an at-will employee at anytime for any non-discriminatory reason" it implies that the jury could not question the reason for the termination because an employer is entitled to fire someone at any time. This error is clearly not harmless and warrants reversal as the Seventh Circuit found in *Achor, supra.* The court's decision to allow this instruction is arbitrary and manifestly unfair. The Court of Appeals violated my due process rights by *sua sponte* raising issues to deny me my right to appellate review under Colorado Appellate Rule 4 which, if done, would have entitled me to retry my case.

III. **The Colorado Court of Appeals erred in holding that the jury instructions tendered by the trial court adequately explained the concept of "pretext" by merely defining it in passing as an "excuse" without providing any additional guidance on this concept, despite its**

integral importance in a proper discrimination analysis under *McDonnell Douglas*.

This case is clearly both a case of disparate treatment and of a discriminatory termination. The undisputed facts here present a paradigm of pretext in the discriminatory termination context. Having established discrimination as a matter of law, this case illustrates exactly why the *McDonnell Douglas* framework is necessary to afford a plaintiff a chance to prove unlawful discrimination. Clearly, the facts presented to the jury prompted them to ask the court if they could award damages. This indicates that their common experiences told them that Defendant's conduct was wrong. However, the jury could not understand how this conduct amounts to unlawful discrimination because the jury instructions did not adequately convey the principles under *McDonnell Douglas* that allowed them to infer intent. A careful examination of the instructions reveals why they reached an improper conclusion.

A) The main goal of McDonnell Douglas is to afford a plaintiff an opportunity to prove unlawful discrimination through indirect evidence by focusing the inquiry to the relevant issues so the plaintiff has a full and fair opportunity to demonstrate pretext.

The reasoning behind the *McDonnell Douglas* framework is well established. In *Burdine, supra,* this Court explained that "Proving discrimination indirectly is done through the series of shifting evidentiary burdens that are 'intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.'" *Burdine,* 450

U.S. at 255. As one federal court notes "The purpose of differentiating between direct and indirect evidence is to aid plaintiffs who genuinely are discriminated against but lack direct evidence to prove it." *E.E.O.C. v. Wendy's of Colorado Springs*, 727 F.Supp. 1375 (D. Colo. 1989). In "indirect evidence" cases, the plaintiff attempts to prove discrimination through evidence that requires additional inferences to prove that discrimination occurred. *Id.* at 1380.

This Court in *Furnco Construction Corp. v. Waters* explained that the prima facie case raises an inference of discrimination because "we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." 438 U.S. 567, 577 (1978). The central inquiry in evaluating whether plaintiff has met this initial burden is whether the circumstantial evidence is sufficient to create an inference that the basis for the challenged employment decision was an illegal criterion. *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285 (8th Cir. 1982).

This Court explained that "Shifting the burden of production on the defendant serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that plaintiff will have a full and fair opportunity to demonstrate pretext." *Burdine*, 450 U.S. at 255-56. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions. *id.*

Under the third step of the analysis, "the inference of discrimination falls away and the

factfinder must weigh the evidence to determine if impermissible discrimination occurred." *id.* "This burden now merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination. [He] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. *id.* (*citing McDonnell Douglas,* 411 U.S. at 804-05).

B. The concept of pretext within the employment discrimination context is well established, with a plethora of case law delineating the factors courts consider in identifying it.

To show pretext, a plaintiff must demonstrate that the defendant was more likely motivated by a discriminatory reason or that its proffered reason is unworthy of credence. *Munoz v. St. Mary-Corwin Hosp.,* 221 F.3d 1160, 1167 (10th Cir. 2000). Plaintiffs typically demonstrate pretext in one of three ways: (1) the defendant's stated reason for the adverse employment action was false; (2) the defendant acted contrary to a written company policy prescribing the action to be taken by the defendant under the circumstances; or (3) the defendant acted contrary to an unwritten policy or contrary to company practice when making the adverse employment decision affecting the plaintiff. *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220 (10th Cir.2000).

A plaintiff who wishes to show that the company acted contrary to an unwritten policy or to

company practice often does so through evidence that he was treated differently from other similarly-situated employees who violated work rules of comparable seriousness. *id* at 1230. To be similarly situated, employees must be supervised by the same person and subject to the same standards concerning performance, evaluation, and discipline. *McGowan v. City of Eufala,* 472 F.3d 736, 745 (10th Cir. 2006). Also important is a comparison of the relevant employment circumstances, such as work history and company policies applicable to the plaintiff and the intended comparable employees. *Aramburu v. Boeing Co.,* 112 F.3d 1398, 1404 (10th Cir.1997).

When a plaintiff alleges that an employer's explanation for terminating him is a pretext for discrimination, the plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons, such that a reasonable factfinder could rationally find them unworthy of credence and infer that the employer did not act for the asserted nondiscriminatory reasons. *Anderson v. Coors Brewing Co.,* 181 F.3d 1171, 1179 (10th Cir. 1999).

When considering a pretext challenge, the issue is not whether the reasons for termination were "wise, fair or correct," but whether the employer believed those reasons to be true and acted upon them in good faith. *Rivera v. City & County of Denver,* 365 F.3d 912, 924 (10th Cir. 2004).

The facts here present a paradigm of pretext in the termination context as this case presents a complete failure to follow university policies and a clear motive of justifying my unlawful termination. The evidence also shows that Defendant's employees were acting in bad faith in effectuating the

termination as their conduct speaks of fraud. In *Townsend v. Lumbermens Mutual Casualty*, the Tenth Circuit determined that a pretext instruction is required in an employment discrimination case where a rational factfinder could reasonably find that the defendant's explanation was false and could infer the employer was dissembling to cover up a discriminatory purpose. 294 F.3d 1232 (10th Cir. 2002).

C. The jury instructions, considered as a whole, grossly misstate the McDonnell Douglas analysis, and effectively deprived me of my right to a fair trial by an impartial jury because the instructions invaded the jury's fact-finding function and were so clearly tailored in favor of Defendant.

On appeal I raised the issue that the failure to provide an adequate pretext instruction amounts to plain error. (Opening Brief on Appeal,pp.14,23-27). The Court of Appeals held that the trial court was under no obligation to sua sponte ensure that the jury was properly instructed as to the law governing this case, and found that I waived my right to appellate review. (Opinion,p.8). However, the Court of Appeals concludes their opinion by stating that "even under a plain error standard of review...the instructions given adequately addressed the concept of pretext by informing the jury that it could reject the University's explanation for the termination if it found it was 'a pretext for discrimination' and defined pretext as an 'excuse for discriminating against plaintiff. Accordingly, we would not find any plain error.'" *id.* at 8-9. This holding is clearly wrong.

Jury instructions must be read and considered together. *Williams v. Chrysler Ins. Co.*, 928 P.2d

1375 (Colo. App. 1996). While true that the trial court has discretion to determine the form and style of the jury instructions, an abuse of discretion mandating reversal occurs when the trial court's decision is manifestly arbitrary, unreasonable, or unfair. *id.* at 1377-78. If an instruction misleads or confuses the jury, it amounts to error. *id.* Language in an instruction cannot constitute grounds for reversal unless it prejudices the substantial rights of a party. *id.* Prejudicial error in an instruction exists when the record shows that a jury might have answered differently if properly instructed. *id.* Plain error occurs when a review of the entire record demonstrates a reasonable possibility that the improper instruction contributed to the verdict. *People v. Dunlap,* 124 P.3d 780 (Colo. App. 2005).

Although not raised by my counsel below, because this case presents a federal question coupled with the quasi-criminal allegations levied against me by the Defendant, it's my contention that the instructional errors here are of Constitutional magnitude. This Court has held that the "test for determining whether constitutional error is harmless is whether it appears beyond a reasonable doubt that error complained of did not contribute to verdict obtained." *Neder v. United States*, 527 U.S. 1, 9 (1999). In the criminal context, only when the reviewing court concludes beyond a reasonable doubt that the omitted element of the offense was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, erroneous instruction is properly found to be harmless. *id.* A review of the instructions given under any of the three standards of review: harmless beyond a reasonable doubt, abuse of discretion, or plain error warrants reversal.

The relevant discrimination instructions are 6-10. (Jury Instructions,Record,v.3,pp.646-651). During the jury instructions hearing my trial counsel argued on my behalf in my absence. (Record,v.9,p.39,lines11-18). The record shows that the majority of the discrimination instructions submitted to the jury were drafted by defense counsel who represented to the court that the instructions were stock instructions appropriate for this type of case. (Record,v.9,p.42-45). According to Defendant, the following two instructions were taken from *Federal Jury Practice and Instructions* (5th Ed. 2001) 171.75 and 171.77. (University's Answer Brief on Appeal,pp.30-31)

Instruction 10 reads:

> You must consider any legitimate, non-discriminatory reason or explanation stated by defendant for its decision. **If you determine that defendant has stated such a reason, then you must decide in favor of Defendant**, unless plaintiff proves by a preponderance of the evidence that the stated reason was not true but was only a pretext or excuse for defendant's discriminating against plaintiff. (emphasis added)

(Jury Instruction 10, Record,v.3,p.651)

Instruction 9 reads:

> Even if an employer is mistaken and its business judgment is wrong, **an employer is entitled to make its own policy and business judgments. An employer may make those employment decisions as it sees fit,** as long as it is not unlawful.

> **In determining whether Defendant's stated reason for its actions was a pretext for discrimination, you may not question Defendant's** business judgment. **Pretext is not established just because you disagree with** the business judgment of **Defendant**, unless you find that Defendant's reason was a pretext for discrimination. (emphasis added)

(Jury Instruction 9, Record,p.650)

Instruction 7, the contested "at-will" instruction, reinforces the mistaken notion that an employer is "free to do what he wants" under the law. Instruction 7 confuses the law of this case because although the court held that there is no legal entitlement to procedural protections in the employment policies (which may be true in the private sector- *citations omitted*), this case involves a state university, therefore procedural due process is implicated. (*see Roth, supra*). Instruction 7 is also incorrect because if an employer provides procedural process to any of its employees, it must provide it to all of them because Title VII requires that all employees be treated equal. (*see also* Equal Opportunity Policy,Suppl. Rec. 277-78; Non-Discrimination Policy,Suppl. Rec. 279). In arguing for Instruction 7, Defendant states it "allows the jury to consider the employer's failure to provide process to the employee and any breach of its own procedures as evidence of gender discrimination in and of itself." (Record,v.9,p.43,lines21-24). Notably, the instruction does not refer to a failure to follow policies as evidence of pretext but as evidence of gender discrimination, which not only supports my

argument above, but significantly, does not tell the jury what to do with this evidence.

Instruction 8 reads:

> In order to establish Plaintiff's case, Plaintiff must prove by a preponderance of the evidence that Defendant was motivated by a gender discriminatory purpose. In other words, Plaintiff must prove that Defendant intentionally and purposefully discriminated against Plaintiff because of gender.
>
> In determining whether Defendant intentionally discriminated because of gender, you may consider all of the evidence presented in this case. Plaintiff may use either direct or indirect evidence.
>
> Plaintiff must prove that Defendant was actually motivated by a gender discriminatory purpose. It is not enough for Plaintiff to show that Defendant's conduct had a negative effect on members of Plaintiff's gender.

(Jury Instruction 8,Record,v.3,p.649)

My trial counsel objected to instruction 8 on the grounds that it was duplicative to instruction 6 and overemphasized. (Record,v.9,p.41,lines6-9; Jury Instruction 6,Record,v.3,p.646-47). The net result of these two instructions is to overemphasize the notion that I need to prove intentional discrimination in order to prevail.

Under a plain error analysis the net result is that the jury was instructed that I had the burden of proving intentional discrimination. (Jury Instructions 6 and 8). The Defendant was free to

terminate me because my employment was at-will, and in terminating me they did not have to afford me any due process. (Jury Instruction 7). The jury could not question the Defendant's decision in terminating me even if they disagreed with it (Jury Instruction 9). And if the Defendant merely offered a reason for my termination, they would have to find for the Defendant unless they found pretext. (Jury Instruction 10). Also, nowhere in the instructions does the court "frame the factual issues" for the jury by identifying what the stated reason is to explain Defendant's actions, and given the facts here present both a discriminatory termination and disparate treatment theories, there is no way to know how the jury arrived at their conclusion that I did not prove unlawful discrimination.

Clearly, these instructions misstate the analysis under *McDonnell Douglas,* obliterating its very purpose, and were drafted in such a way as to afford me no chance of proving discrimination short of proving direct evidence of intent. The critical piece missing here is a definition of pretext. Had the jury been instructed that a failure to follow policies amounts to pretext, and that a finding of pretext allows them to *infer* discriminatory intent, the jury surely would have returned a verdict in my favor. This analysis is consistent with Defendant's admission that this case presents a failure on the part of the University to follow proper procedures, and the jury question regarding awarding me damages. Viewing the record as a whole, there is clearly a reasonable possibility that the outcome of this case would have been different but for the absence of this instruction. Therefore, even if this case were pled as a discriminatory termination instead of under a disparate treatment theory, I

would be entitled to retry this case for instructional plain error.

IV. The Colorado Court of Appeals opinion in this case demonstrates a potential impermissible bias in favor of the University of Colorado that violated my right to have this case decided by a fair and impartial tribunal.

Although the Court of Appeals acknowledges that my argument centered around the discriminatory investigation, their opinion inexplicably shifts focus to a discriminatory termination, without citing any authority that allows a defendant to define and change the cause of action brought by a plaintiff. (Opinion,pp.1-4). While there was a legitimate issue raised regarding the propriety of an at-will instruction, an issue that the Defendant did not claim was waived, the Court of Appeals *sua sponte* found that the issue was not properly preserved and declined to rule on the issue, when Seventh Circuit precedent suggests that my argument has merit. (Opinion,pp.6-8). In contrast, the Court of Appeals holds that a trial court has no obligation to *sua sponte* ensure that the jury is properly instructed as to the law governing a case, but nonetheless curiously finds no plain error in the jury instructions which were so clearly tailored in favor of Defendant.

In *Miller v. Byrne* the Court of Appeals held that an instruction of "bad faith" was not sufficient. 916 P.2d 566 (Colo. App. 1996)(Casebolt). "While 'bad faith' was inferentially defined as a failure to settle the claims without a reasonable basis, 'reasonableness' under the circumstances was not defined. Without a definition of that concept, we

cannot determine to what extent the jury applied its own definition, or was misled." *id.* (citing *Mile Hi Concrete, Inc. v. Matz*, 842 P.2d 198 (Colo. 1992)). The court reversed because the standard of care applicable to defendant's conduct is an integral part of the instructions. *id.*

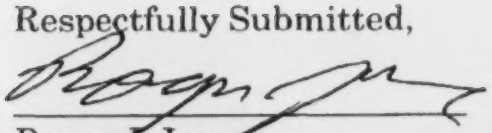
Pretext is integral to the *McDonnell Douglas* analysis. Under *Byrne* because "pretext" was not adequately defined, there is no way to determine how the jury reached its conclusion. I humbly ask this Court to explain how the Court of Appeals could come to directly opposite holdings but for either a complete misapprehension of *McDonnell Douglas* or for an impermissible bias in favor of the University; either of which would entitle me to a new trial. (*see Tumey v. Ohio*, 273 U.S. 510 (1927)(biased trial judge warrants reversal)).

CONCLUSION

The entire purpose behind *McDonnell Douglas* is to aid plaintiffs in proving intentional discrimination. This case represents a complete breakdown of the analytical framework. The clear errors presented here can be used for settling an issue that has not yet been decided by this Court: What are the principles that need to be conveyed to *juries* in order for them to conduct a proper "pretext" analysis?

Wherefore, I humbly request and pray that this Supreme Court grants my petition for a writ of certiorari to resolve all of the issues presented herein.

Respectfully Submitted,



Roger J. Lucas
On this 27 day of April, 2009

APPENDIX

Amendment VII, U.S. Constitution:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment XIV, U.S. Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §2000e-2:

(a) Employer practices
It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

COPY

In the District Court for the City and County of Denver, ctrm 2

Case # 04CV9046

ROGER LUCAS,
Plaintiff,

v.

UNIVERSITY OF COLORADO HEALTH SECIENSES *[sic]* CENTER, et al.,
Defendants.

ORDER RE: PLAINTIFF'S MOTION FOR POST-TRIAL RELIEF

Viewing the evidence in the light most favorable to the jury's verdict, see *Woznicki v. Musick*, 119 P.3d 567 (Cub.App.2005) *[sic]*, the court finds that there was sufficient evidence, as pointed out in part in the response, to support a finding by a reasonable jury that the University had a non-discriminatory basis for terminating plaintiff's employment and that the reason for termination was not a pretext for discrimination.

Plaintiff's motion pursuant to C.R.C.P. 59(a)(1) is denied.

Dated this 5th day of January, 2007.

By the Court:
John N. McMullen
District Court Judge

COPY

In the Colorado Court of Appeals

ROGER LUCAS,
Plaintiff-Appellant,

v.

UNIVERSITY OF COLORADO- HEALTH SCIENCES CENTER, a public entity and educational institution,
Defendant-Appellee.

Court of Appeals No.:07CA0166
City and County of Denver District Court No. 04CV9046

JUDGMENT AFFIRMED

Division III
Opinion by: JUDGE CASEBOLT
Russel and J. Jones, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced May 15, 2008

*[*1]* In this employment discrimination case, plaintiff, Roger Lucas, appeals the judgment in favor of defendant, the University of Colorado Health Sciences Center (University), as well as the trial court's denial of his motion for judgment notwithstanding the verdict. We affirm.

Plaintiff worked in a University laboratory with a female co-worker (victim), who reported instances in which plaintiff improperly touched her and verbally berated her. Following an investigation, the University terminated plaintiff's employment for violation of its anti-violence policy.

Plaintiff then initiated this action asserting gender discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a), and the Colorado Anti-Discrimination Act, section 24-34-402(1)(a), C.R.S. 2007. The jury determined that plaintiff had failed to prove that the University's actions in terminating him were motivated by his gender and found for the University.

Plaintiff then filed a motion for judgment notwithstanding the verdict under C.R.C.P. 59, asserting that the evidence did not support the jury's verdict and that he was entitled to judgment as a *[*2]* matter of law. The trial court denied the motion, and this appeal followed.

I.

Plaintiff asserts that the trial court erred in denying his motion for judgment notwithstanding the verdict because facts presented at trial indicated that the tenor and conduct of the investigation into the

allegations against him were determined by gender bias. We disagree.

An appellate court reviews a trial court's decision to grant or deny a C.R.C.P. 59 motion for post-trial relief for an abuse of discretion. *Kaercher v. Sater*, 155 P.3d 437, 443 (Colo. App. 2006). A trial court abuses its discretion in denying a motion for judgment notwithstanding the verdict only if the evidence, viewed in the light most favorable to the prevailing party, is such that no reasonable person could reach the same conclusion as that reached by the jury. *Jones v. Stevinson's Golden Ford*, 36 P.3d 129, 132 (Colo. App. 2001). If there is any support for the jury's verdict in the record, a court may not disturb it. *Morales v. Golston*, 141 P.3d 901, 906 (Colo. App. 2005).

*[*3]* To establish a prima facie case of gender discrimination in employment, the plaintiff must prove (1) that he belongs to a protected class; (2) that he was qualified for the position; (3) that he suffered an adverse employment decision; and (4) that the circumstances give rise to an inference of unlawful discrimination. *St. Croix v. Univ. of Colo. Health Scis. Ctr.*, 166 P.3d 230, 236 (Colo. App. 2007).

If a plaintiff establishes a prima facie case of discrimination, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employment decision. If the employer produces such an explanation, the plaintiff must then be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for the

employment decision were in fact a pretext for discrimination. *Id.*

Here, while plaintiff acknowledges that under the appropriate standard of review we must construe the evidence in the light most favorable to the University, he nevertheless sets forth a number of facts that he contends demonstrate, as a matter of law, the disparity in treatment meted out to him as the male co-worker accused of improper behavior by a female co-worker. Plaintiff *[*4]* essentially requests us to conclude that the alleged disparity in treatment between him and the victim during the University's investigation is such that no reasonable person could reach the conclusion that his termination was not motivated by gender discrimination. Contrary to plaintiff's contention, when we view the evidence in the light most favorable to the University, it is clear that a reasonable person could reach the conclusion that plaintiff's termination was not impermissibly motivated by gender discrimination.

Here, there was ample evidence that the University terminated plaintiff's employment for a legitimate, nondiscriminatory reason. It was undisputed that plaintiff was an employee at-will, and that he had agreed to abide by the University's anti-violence policy, which essentially prohibited intimidating, threatening, or violent behavior.

The victim testified that plaintiff had touched her in unwanted ways, despite being told not to do so, and that he had verbally abused her and had physically intimidated her. Another former co-worker confirmed that plaintiff had touched the victim in

objectionable ways and had created an intimidating work environment. Plaintiff's former supervisor testified that plaintiff's conduct in the workplace *[*5]* was unacceptable and that the supervisor believed terminating plaintiff was necessary to allow the laboratory to function properly. Finally, plaintiff admitted in his testimony that his conduct in the workplace was inappropriate, and he acknowledged that the University could legally terminate him for improper workplace conduct.

The evidence concerning the investigation, when viewed in the light most favorable to the University, reveals the following. Plaintiff's supervisor spoke with him after the victim complained that he had hit her, and plaintiff did not deny hitting the victim. Plaintiff's supervisor spoke with him again after a verbal abuse incident and informed him that he needed to act professionally. Plaintiff wrote a letter, which was reviewed by his supervisor and the Human Resources Department, which provided his interpretation of events. In it, he admitted that he had been "vocally volatile" and "rude and unprofessional" in the laboratory. The supervisor spoke with other members of the laboratory to confirm that plaintiff was not an appropriate person to have in the laboratory. Finally, the supervisor had informed plaintiff of the allegations against him.

*[*6]* This evidence supports a finding that the investigation and termination were not impermissibly discriminatory. A fortiori, a reasonable juror could find against plaintiff. Accordingly, the trial court did not abuse its discretion in denying plaintiff's motion.

II.

Plaintiff asserts that the trial court erred in giving an instruction to the jury stating that his employment was at-will. Specifically, he argues that the instruction was both irrelevant and capable of confusing the jury. We decline to review this contention.

Parties must make objections to any proposed instructions before they are submitted to the jury, and only grounds so specified will be considered on appeal. C.R.C.P. 51, *Am. Family Mut. Ins. Co. v. Bowser*, 779 P.2d 1376, 1382 (Colo. App. 1989).

Here, the instructions given stated as follows:

> The Court instructs you that Plaintiff was an employee at-will. The law permits an employer to discharge an at-will employee at any time for any non-discriminatory reason. The law does not require an employer to afford an employee any particular due process, such as reasonable notice of the allegations against an employee or a reasonable opportunity to be heard before discharging an employee. You may, however, consider an employer's failure to provide such opportunities or follow its procedures as evidence of gender discrimination.

*[*7]* Plaintiff's tendered instruction, rejected by the trial court, stated:

> Procedural due process means a reasonable notice of allegations against one, and a reasonable opportunity to be heard by the decision maker. While you may consider any lack of procedural due process in plaintiff's

> termination proceedings as evidence of gender discrimination since plaintiff was an at-will employee, you may not determine he had a constitutional right to procedural due process in connection with the termination proceedings.

Plaintiff's counsel objected to the court's version of the instruction, stating that "all of the- the claims upon which the employment at-will should- would be a- may be a central part of the case the Court has ruled on, and the issue then becomes how is the best way to explain to the jury that those matters are not there." Plaintiff's counsel went on to suggest that his version was "a more accurate statement of the law," did not "overemphasize the employment at-will language," and made clear that the jury could not "make a determination of a constitutional or contractual right but may nevertheless look at that material for purposes of determining discrimination."

We conclude that plaintiff failed to object in the trial court on the basis he now asserts on appeal. We also note that plaintiff *[*8]* included similar at-will language in his tendered version of the instruction and that both versions stated essentially the same thing in somewhat different language. Because plaintiff did not object to the instruction at trial on the grounds he raises now, we decline to address the issue.

III.

Plaintiff asserts that the trial court should have given an instruction defining pretext and that its failure to do so sua sponte was plain error requiring reversal and a new trial. We disagree.

Counsel has the duty to examine the instructions, and his or her failure to detect errors and call the trial court's attention to them ordinarily operates as a waiver of the objection. *Shellabarger v. Atencio*, 492 P.2d 415, 418 (Colo. App. 1971)(not published pursuant to C.A.R. 35(f)).

Here, plaintiff did not object to the lack of a pretext instruction. Accordingly, he has waived any right to appellate review of his claim.

Moreover, even were we to consider this contention under a plain error standard of review as plaintiff requests, the instructions given adequately addressed the concept of pretext by informing the *[*9]* jury that it could reject the University's explanation for termination if it found it was "a pretext for discrimination" and defined pretext as an "excuse for discriminating against plaintiff." Accordingly, we would not find any plain error.

The judgment is affirmed.

JUDGE RUSSEL and JUDGE J. JONES concur.

COPY

In the Supreme Court for the State of Colorado

Case # 2008SC599
Certiorari to the Court of Appeals, 2007CA166
District Court, City and County of Denver,
2004CV9046

ROGER LUCAS,
Petitioner,

v.

UNIVERSITY OF COLORADO- HEALTH SCIENCES CENTER, a public entity and educational institution,
Respondent.

ORDER OF COURT

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, December 22, 2008